SHARTSIS FRIESE LLP
ZESARA C. CHAN (Bar #136302)
TRACY A. DONSKY (Bar #197114)
One Maritime Plaza, 18th Floor
San Francisco, California 94111-3598
Telephone: (415) 421-6500
Facsimile: (415) 421-2922

Attorneys for Defendants
MARTINDALE-HUBBELL AND
LEXIS/NEXIS, divisions of
REED ELSEVIER, INC.

UNITED STATED DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

INHERENT.COM aka INHERENT, INC. Plaintiff, v. MARTINDALE-HUBBELL, LEXIS/NEXIS INC. and DOES 1 through 200 inclusive, Defendants.	No. C 05 3515 MHP **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO TRANSFER PURSUANT TO 28 U.S.C. § 1404; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: October 31, 2005 Time: 2:00 p.m. Courtroom: 15 Judge: Honorable Marilyn H. Patel Complaint Filed: July 29, 2005

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

Dockets.Justia.com

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

NOTICE OF MOTION AND MOTION

To ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 31, 2005 at 2:00 p.m., or as soon thereafter as the matter may be heard in the Courtroom of the Honorable Marilyn H. Patel, Courtroom 15, in the United States District Courthouse located at 450 Golden Gate Avenue, San Francisco, California, Defendants Martindale-Hubbell and Lexis/Nexis, divisions of Reed Elsevier, Inc. (collectively, "Defendants") will, and hereby do, move to dismiss the Complaint in the present action (which was removed by Defendants pursuant to a Notice of Removal filed on August 30, 2005, and in accordance with 28 U.S.C. §§ 1441(a) and (b), 1446, and 1332) on the grounds that another action, which was filed prior to the present action, involving the same parties and same facts is already pending in the United States District Court for the District of New Jersey, and the Court should dismiss this action pursuant to the "first to file" doctrine; in the alternative, Defendants will and hereby do seek an order transferring this action to the District of New Jersey pursuant to 28 U.S.C. § 1404(a) for the convenience of the parties and witnesses and in the interests of justice, or dismissing the present Complaint for failure to state a claim pursuant to Federal Rules of Civil Procedure §§ 12(b)(6) and 9(b) for failure to plead allegations of fraud with particularity.

Defendants' Motion is based on this Notice, the accompanying Memorandum of Points and Authorities, the Declarations of Michael Little, Timothy Corcoran, Mark E. Duckstein and Fernando Marinez, the Request for Judicial Notice, and supporting documents, all pleadings, records, and papers on file in this action, and such further evidence and arguments as may be presented to the Court on or before the hearing on this motion.

DATED: September 7, 2005 SHARTSIS FRIESE LLP

By /s/ Zesara C. Chan
ZESARA C. CHAN

Attorneys for Defendants
MARTINDALE-HUBBELL AND
LEXIS/NEXIS, divisions of REED ELSEVIER, INC.

TABLE OF CONTENTS

Page

I. INTRODUCTION AND STATEMENT OF ISSUES 1

II. STATEMENT OF FACTS 2

A. The Parties 2

B. MH was am ICI Customer, and ICI and MH Were Parties To A Marketing Alliance Agreement Prior To The Execution Of The Non-Binding Letter of Interest 3

C. ICI Proposes An Acquisition Deal to MH 5

D. The Non-Binding Letter is Fully Executed on June 17, 2005, and thereafter, MH Performs Due Diligence 6

E. MH informs ICI on June 28, 2005, That It Does Not Wish To Proceed With Any Transaction With ICI 7

F. MH Is "First To File" Its Action In New Jersey on July 18, 2005; After Learning of MH's New Jersey Action, ICI Files Its Own Action In California on July 29, 2005. 8

III. UNDER THE "FIRST TO FILE" DOCTRINE, THIS COURT SHOULD DISMISS THIS ACTION IN FAVOR OF THE PREVIOUSLY-FILED NEW JERSEY ACTION, OR ALTERNATIVELY, TRANSFER THIS ACTION TO THE NEW JERSEY DISTRICT COURT 9

IV. ABSENT DISMISSAL, THE PRESENT ACTION SHOULD BE TRANSFERRED TO THE DISTRICT OF NEW JERSEY PURSUANT TO 28 U.S.C. SECTION 1404(A) FOR THE CONVENIENCE OF THE PARTIES AND IN THE INTEREST OF JUSTICE 11

V. THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(6) FOR FAILURE TO PLEAD FRAUD WITH PARTICULARITY 21

VI. CONCLUSION 23

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111

TABLE OF AUTHORITIES

Page

CASES

A.J. Industries, Inc. v. United States Dist. Ct., 503 F.2d 384 (9th Cir. 1974) 2, 19

Alltrade Inc. v. Uniweld Products, Inc., 946 F.2d 622 (9th Cir. 1991) 2, 9, 11

Berman v. Infomix Corp., 30 F. Supp. 2d 653 (S.D.N.Y. 1998) 2, 16

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 2, 13, 14, 15

Cambridge Filter v. International Filter Co., Inc., 548 F. Supp. 1308 (D. Nev. 1982) 2, 19

Church of Scientology of Calif. v. United States Dep't of Army, 611 F.2d 738 (9th Cir. 1979) 2, 9, 11

DeJames v. Magnificence Carrier Inc., 654 F.2d 280 (3d Cir.), cert. denied, 454 U.S. 1085 (1981) 2, 13

Decker Cole. Co. v. Common Wealth Edison Co., 805 F.2d 834 (9th Cir. 1986) 2, 15, 16

Desaigoudar v. Meyercord, 223 F.3d 1020 (9th Cir. 2000) 2, 21

Doumani v Casino Control Comm'n, 614 F. Supp. 1465 (D.N.J. 1985) 2, 13

Durham Production, Inc. v. Sterling Film Portfolio, Ltd., Series A, 537 F. Supp. 1241 (S.D.N.Y. 1982) 2, 16

Ferens v. John Deere Co., 494 U.S. 516 (1990) 2, 19

In re Glenfed Inc. Sec. Litig., 42 F.3d 1541 .... 2, 22

Geo. F. Martin Co. v. Royal Insurance Co. of Am., 2004 WL 1125048 3 (N.D. Cal. 2004) 16

Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp., 820 F.Supp. 503 (C.D. Cal. 1992) 2, 11, 12

Haisten v. Grass Valley Medical Reimbursement Fund Ltd., 784 F.2d 1392 (9th Cir. 1986) 2, 15

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111

TABLE OF AUTHORITIES
(continued)

Page

Harrison v. Westinghouse Savannah River Co., 176 F.3d 776 (4th Cir. 1999) 21

Hayduk v. Lanna, 775 F.2d 441 (1st Cir. 1985) 21

Helfant v. LA & So Life Ins. Co., 82 F.R.D. 53 (E.D.N.Y. 1979) 17

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) 14, 15

Henry Heide Inc. v. WRH Prods. Co., 766 F.2d 105 (3d Cir. 1985) 14

Hernandez v. Graebel Van Lines, 761 F. Supp. 983 (E.D.N.Y. 1991) 16

In re Horseshoe Entertainment, 305 F.3d 354 (5th Cir. 2002) 17

Injen Technology Co., Ltd. v. Advanced Engine Mgmt., Inc., 270 F. Supp. 2d 1189 (S.D. Cal. 2003) 16

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 13

Jones v. GNC Franchising, Inc., 211 F.3d 495 (9th Cir. 2000) 11, 16, 21

Laumann Mfg. Corp. v. Castings USA, Inc., 913 F. Supp. 712 (E.D.NY 1996) 19

Lou v. Belzberg, 834 F.2d 730 (9th Cir. 1987) 20

Mellon Bank (East) PSFS Nat'l Ass'n v. Farino, 960 F.2d 1217 (3d Cir. 1992) 14, 15

Moore v. Kayport Package Express, Inc., 885 F.2d 531 (9th Cir. 1989) 22

Pacesetter Systems, Inc. v. Medtronic, Inc., 678 F.2d 93 (9th Cir. 1982) 9, 10, 11

Pacific Car & Foundry Co. v. Pence, 403 F.2d 949 (9th Cir. 1968) 17, 20

Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n, 819 F.2d 434 (3d Cir. 1987) 14

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111

TABLE OF AUTHORITIES
(continued)

Page

Reiffin v. Microsoft Corp.,
104 F. Supp. 2d 48 (D.C. 2000) 21

Roth v. Garcia Marquez,
942 F.2d 617 (9th Cir. 1991) 14

Royal Queentex Enterprises, Inc. v. Sara Lee Corp.,
2000 WL 246599 3 (N.D. Cal. 2000) 21

Soloman v. Continental American,
472 F.2d 1043 (3d Cir. 1973) 16

Sundle Lining Const. Corp. v. Fireman's Fund Ins. Co.,
844 F. Supp. 1163 (S.D. Tex. 1994) 16, 19

Van Dusen v. Barrack,
376 U.S. 612, 84 S.Ct. 805 (1964) 11, 19

Vess v. Ciba-Geigy Corp. USA,
317 F.3d 1097 (9th Cir. 2003) 22

Ward v. Follett Corp.,
158 F.R.D. 645 (N.D. Cal. 1994) 9

Wartsila NSD North America v. Hill Intern., Inc.,
269 F. Supp. 2d 547 (D. N. J. 2003) 13

Williams v. Bowman,
157 F. Supp. 2d 1103 (N.D. Cal. 2001) 15, 21

Worldwide Volkswagen Corp. v. Woodson,
444 U.S. 286, 100 S. Ct. 559 (1980) 14

STATUTES

28 U.S.C. § 1332 1

28 U.S.C. § 1391(a)(2) 12

28 U.S.C. § 1441(a) 1

28 U.S.C. § 1441(b) 1

28 U.S.C. §1446 1

RULES

Fed. Rule Civ. Proc. 4(e) 13

Fed. Rule Civ. Proc. § 9(b) 1, 2, 21

Fed. Rule Civ. Proc. § 12(b)(6) 1

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111

I. INTRODUCTION AND STATEMENT OF ISSUES

The underlying facts of this action have no nexus to California. The present dispute arises from a non-binding letter of interest signed in June 2005 ("Non-Binding Letter") by Defendant Martindale-Hubbell ("MH"), a division of Reed Elsevier, Inc. located in New Jersey, to explore a possible acquisition of Plaintiff Inherent.com, aka Inherent, Inc. (collectively, "ICI"), located in Oregon. By the terms of the Non-Binding Letter, MH had no obligation to consummate any acquisition of ICI. The Non-Binding Letter expressly provided that it "create[d] no legally binding obligation on the part of the parties to conclude the proposed transaction, ... notwithstanding any subsequent actions or communications...." Less than two weeks later, on June 28, 2005, after MH performed its due diligence, MH from its New Jersey office advised ICI in Oregon that it would not proceed with any proposed transaction. In connection with considering a possible acquisition, the parties also executed a Non-Disclosure Agreement to facilitate the exchange of potentially proprietary information. The parties agreed that the Non-Disclosure Agreement would be governed by New Jersey law.

From about August 2004, when ICI made its initial inquiry to MH about MH's interest in a possible acquisition of ICI, through June 28, 2005, when MH declined to proceed with any proposed deal, none of the telephone calls, meetings, or other events related the parties' discussions on a possible transaction occurred in San Francisco or anywhere in California. None of the emails or correspondence between the parties on the possible pact was sent to or from San Francisco or California. Virtually all of the contacts and events relevant to this action occurred either in New Jersey or Oregon. The facts giving rise to the claims asserted herein have no connection whatsoever to California. For example:

- MH is headquartered in New Jersey;
- The parties' Non-Disclosure Agreement which facilitated the exchange of proprietary information between ICI and MH is governed by New Jersey law;
- Virtually all of the negotiations of the underlying transaction took place in the parties' respective offices in New Jersey or Oregon;
- The Non-Binding Letter, was created in New Jersey, and executed by the parties at their respective offices in Oregon and New Jersey;

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

- Defendants allegedly breached the Non-Binding Letter in New Jersey where MH decided it would not proceed with any proposed transaction;
- Most of the likely witnesses in this action are located in New Jersey; and
- All documents relevant to this dispute are likely located in New Jersey or Oregon; and
- Based on its own website, ICI has its principal place of business in Oregon, and lists no office or contact information in California.

With no connection to California, this action plainly does not belong in this Court, and there is no legitimate reason to burden this Court (or the taxpayers of California) with this case.

On July 29, 2005, in a transparent effort to "forum shop" and bring the case to California, where ICI's San Francisco counsel is located, ICI tactically filed a state court action in San Francisco against MH despite learning some ten days prior that a New Jersey action had already been filed by MH against ICI involving the same facts and claims. Filing this action in California was apparently motivated to suit the convenience of Inherent's counsel who is located in this district, and to force MH to litigate far away from its New Jersey office, and far away from where the large majority of witnesses and documents are located. The convenience of Plaintiff's counsel should be insufficient to retain this action in a district that has little or no relationship to the underlying facts and is thousands of miles from where another action based on the same facts is already pending.

Under the widely recognized "first-to-file" doctrine, this action should be dismissed (or transferred) in favor of the pre-existing New Jersey federal action involving the very same parties, facts and circumstances. Because the New Jersey action is in the early stages, ICI can assert its claims and defenses against MH in the New Jersey case. Alternatively, Defendants' seek an order pursuant to 28 U.S.C. § 1404(a) transferring this matter to the District of New Jersey because the majority of the witnesses and documents are located in New Jersey and it would serve the interests of justice, or dismissing the Complaint for failure to plead fraud with particularity under Federal Rule of Civil Procedure 9(b).

II. STATEMENT OF FACTS

A. The Parties

MH, a division of Reed Elsevier, Inc., has its principal place of business in New

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

Providence, New Jersey. [Declaration of Michael Little submitted herewith ("Little Decl."), ¶ 2; Declaration of Timothy B. Corcoran submitted herewith ("Corcoran Decl."), ¶ 2.] MH's business consists of providing various products and services used by the legal profession. [Little Decl., ¶ 2; Corcoran Decl., ¶ 2.] LexisNexis ("LN") is also a division of Reed Elsevier, and an affiliate of MH, and has a principal place of business in Miamisburg, Ohio. [Little Decl., ¶ 2; Corcoran Decl., ¶ 2.][1]

At all times relevant to the circumstances giving rise to the claims in this action, ICI has been a corporation incorporated under Oregon law, with its principal and only place of business listed at 2140 SW Jefferson Street, Suite 200, Portland, Oregon. [Little Decl., ¶ 3; Corcoran Decl., ¶ 3; Declaration of Fernando Marinez submitted herewith ("Marinez Decl.", ¶ 3, 5 and Exh. A (Oregon Secretary of State records); Request for Judicial Notice ("Req. Jud."), Exh. C.] ICI's business consists of providing internet-related services (e.g., website development and hosting) for professional organizations, primarily law firms and legal professional associations. [Little Decl., ¶ 3; Corcoran Decl., ¶ 3; Marinez Decl., ¶ 5 and Exh. C.] Based on a review of the California Secretary of State records, ICI is neither registered to do business in the State of California, nor registered as a foreign corporation. [Marinez Decl., ¶ 4 and Exh. B.] Moreover, the local telephone directory assistance service has no phone listing in San Francisco for an "Inherent, Inc." or "Inherent.com." [Marinez Decl., ¶ 6.]

B. MH was am ICI Customer, and ICI and MH Were Parties To A Marketing Alliance Agreement Prior To The Execution Of The Non-Binding Letter of Interest.

Since the mid-1990s and well before the Non-Binding Letter was signed, MH and ICI had a long-standing business relationship where MH hired ICI to build websites for MH's proprietary business; thereafter, MH and ICI entered into a Marketing Alliance Agreement where ICI provided website design work for MH's law firm customers. [Corcoran Decl., ¶ 4 and Exh. A.] The Marketing Alliance Agreement provided that any disputes between the parties would be resolved through an arbitration to take place in either New Jersey or New York. [Corcoran Decl., ¶ 5 and

[1] Although ICI has also named LN as a defendant, substantially all of the activity related to the potential acquisition of ICI occurred through LN's affiliate, MH. LN adopts MH's arguments herein.

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

Exh. A (paragraph 11 of Marketing Agreement).] ICI viewed its marketing arrangement with MH as an important relationship and touted its connection with MH on its website. On its website, ICI highlights its relationship with MH from 1996-2002 as a "strategic marketing agreement to promote and develop Web sties for law firms worldwide." [Marinez Decl., ¶ 5 and Exh. C.]

During the years in which the Marketing Alliance Agreement was in effect, ICI at times received revenues annual revenues in excess of $200,000 that were generated by MH's sales to its customers. [Corcoran Decl., ¶ 6.] By 2002, MH discontinued its relationship with ICI under the Marketing Alliance Agreement. [Corcoran Decl., ¶ 7.] However, the relationship between MH and ICI remained cordial and MH continued to do business with ICI. [Corcoran Decl., ¶ 8.] In 2003, MH paid ICI over $93,000; in 2004, MH paid ICI over $67,000; and in 2005, MH's payments to ICI so far have been approximately $78,000. [Corcoran Decl., ¶ 8.] Since January 2000, MH has paid ICI over $1,000,000. [Corcoran Decl., ¶ 9.]

Over the course of the business relationship between MH and ICI, ICI had extensive contact with MH's New Jersey office. ICI executives visited MH's New Jersey offices approximately forty times, with approximately 35 visits by the President of ICI (three individuals held that office successively), including ICI's current President, Ms. Debra Kamys. [Corcoran Decl., ¶ 10.] In addition, ICI traveled with MH personnel to many locations outside of Oregon, such as to trade shows and other client or business related events, in connection with the Marketing Alliance Agreement. [Corcoran Decl., ¶ 11.]

Accordingly, MH and ICI were in extremely regular contact for almost a ten-year period, with the frequency of those contacts being very high during the 1996-2002 time frame in which the Marketing Alliance Agreement was operative. [Corcoran Decl., ¶ 12.] Prior to August 2004, when the facts giving rise to the present claims began, ICI representatives contacted MH personnel in New Jersey hundreds of times by telephone and likely sent over 1000 e-mails to MH representatives in New Jersey. [Corcoran Decl., ¶ 13.] In addition, ICI sent many documents to MH representatives in New Jersey by mail and by facsimile transmission. [Corcoran Decl., ¶ 13.]

C. ICI Proposes An Acquisition Deal to MH.

In approximately August 2004, ICI, through its President, Debra Kamys, contacted MH in

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

New Jersey about whether MH would be interested in exploring a possible acquisition of ICI or entering into some other sort of partnering arrangement. [Corcoran Decl., ¶ 14; Little Decl., ¶ 4.] An MH competitor had recently acquired an ICI competitor, and Ms. Kamys suggested that a proper competitive response to that transaction might be for MH to acquire ICI. [Corcoran Decl., ¶ 14; Little Decl., ¶ 4.]

After preliminary discussions, MH and ICI entered into a Non-Disclosure Agreement dated November 1, 2004 to explore a potential business relationship and to enable ICI to provide purportedly proprietary information for MH's evaluation of a possible transaction. [Little Decl., ¶ 5 and Exh. A.] By its terms, the Non-Disclosure Agreement was governed by New Jersey law, and established a two-year period (through November 1, 2006) during which its confidentiality terms remained in effect. [Little Decl., ¶ 5-6 and Exh. A.] The Non-Disclosure Agreement set forth certain described limitations on the use by either MH or ICI of confidential, proprietary, or trade secret information disclosed by the other party, and further provided that proprietary information would be returned or certified as destroyed, upon ICI's written request. [Little Decl., ¶ 6.]

Many MH employees were involved in evaluating a potential acquisition or other strategic alliance with ICI, and the vast majority of these witnesses are located in New Jersey. [Little Decl., ¶ 18-19.] From August 2004 through June 2005, MH and ICI had many communications (by telephone, e-mail, and in person) regarding a potential business relationship between the companies, and ICI provided MH with information regarding its operations. [Little Decl., ¶ 7.] During this period, ICI called or sent email to MH representatives in New Jersey, approximately 100 times, to discuss the potential acquisition of ICI by MH or some other business relationship. [Little Decl., ¶ 7.] In addition, in May 2005, ICI's President, Ms. Kamys traveled to New Jersey to spend a full day with key executives from MH and its affiliate, LexisNexis, making presentations about ICI's products and business operations in connection with the possible transaction with MH. [Little Decl., ¶ 7.]

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

D. The Non-Binding Letter is Fully Executed on June 17, 2005, and thereafter, MH Performs Due Diligence.

During Ms. Kamys' visit on or about May 25, 2005, MH presented ICI with a proposed Non-Binding Letter of Interest, which stated MH's ". . . preliminary non-binding indication of interest in acquiring the web site development, management and hosting applications and services business . . . of Inherent.com, Inc. . . . and [its] proposed next steps to move this potential transaction forward." [Little Decl., ¶ 8 and Exh. B.]

From late May through mid-June 2005, ICI and MH continued to negotiate the terms of the Non-Binding Letter and MH sent numerous e-mails from New Jersey to ICI and held several conference calls in connection with the negotiations. [Little Decl., ¶ 9.] ICI knew that there remained contingencies on completing a deal. Among the modifications made at ICI's request was an amendment of the language to provide that the possible transaction was subject to the parties reaching "mutually acceptable" purchase and sale contract terms and the execution of definitive transaction documents. [Little Decl., ¶ 9 and Exh. C (at page 3).]

The Non-Binding Letter of Interest was fully executed on June 17, 2005. [Little Decl., ¶ 9 and Exh. C.] The Letter expressly provided that the execution of the Non-Binding Letter did not obligate MH to complete any transaction with ICI. The Non-Binding LOI proposed by MH to ICI provided that:

> ". . . this letter and the acceptance thereof is non-binding and creates no legally binding obligation on the part of the parties to conclude the proposed transaction, and no legally binding obligation to conclude the proposed transaction will be created, notwithstanding any subsequent actions or communications, written or oral, between the parties, even though they may express or imply partial or preliminary agreement, except by the execution and delivery by all parties of definitive transaction documents."

[Little Decl., ¶ 11 and Exh. C at p.5.] The fully executed Non-Binding Letter further stated that MH's interest in purchasing Inherent was contingent on numerous specified "conditions precedent" to the completion of any transaction, including but not limited to (i) the satisfactory completion "of a full commercial, financial, technical and legal due diligence" by MH, (ii) the negotiation of acceptable purchase and sale contract terms acceptable to Reed Elsevier, and (iii) approval by the Board of Directors of Reed Elsevier. [Little Decl., ¶ 10 and Exh. C.] Moreover, ICI was well

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

aware that the due diligence period following the execution of the Non-Binding Letter could result in the termination of discussions. As the Non-Binding Letter provided, ICI agree to cease solicitation of other offers to dispose of ICI's business "until a transaction is consummated or terminated, or July 31, 2005, whichever first occurs." [Little Decl., Exh. C at pp. 4-5.]

On June 15, 2005, ICI signed the revised Non-Binding Letter dated June 8, 2005, and sent it to MH's New Jersey office. [Little Decl., ¶ 12.] On June 17, 2005, a significant ICI shareholder also signed the Non-Binding Letter, as required by MH. [Little Decl., ¶ 12.] Following the execution of the Non-Binding Letter by ICI, MH undertook due diligence necessary to evaluate the feasibility and potential terms of a business transaction with ICI. [Little Decl., ¶ 13.]

E. MH informs ICI on June 28, 2005, That It Does Not Wish To Proceed With Any Transaction With ICI.

While performing due diligence, MH learned information which caused it to discontinue its consideration of any business transaction with ICI. [Little Decl., ¶ 14.] Among other reasons, MH elected to terminate its interest in entering into such a transaction with ICI because the due diligence review revealed (i) many problems with ICI's technology and database (its principal asset was its computer code, which was found to be riddled with errors and no longer supported by the licensor of the technology), (ii) that ICI's finances were much weaker than expected, (iii) that ICI's customer base was less than what was represented, and (iv) that none of ICI's employees had non-compete agreements, and one of them -- the former chief technology representative -- had recently quit to establish a competitive venture. [Little Decl., ¶ 14.]

During the course of performing due diligence on ICI's assets, liabilities, sales, marketing, and other business and financial operations, MH found no indication that ICI had any offices in California, any employees in California, or any real property in California. [Little Decl., ¶ 15.]

On June 28, 2005, less than two weeks after the Non-Binding Letter had been fully executed by the parties, MH's Chief Operating Officer, who was located in New Jersey, advised ICI by telephone and in writing that MH had no interest in moving forward with any proposed transaction with ICI. [Little Decl., ¶ 16 and Exh. D.] Following MH's decision to terminate the discussions between the parties, MH undertook to gather and return to ICI the confidential

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

information provided under the Non-Disclosure Agreement to ICI, and secured certifications from members of the MH due diligence team stating that they did not retain confidential information regarding ICI. [Little Decl., ¶ 17 and Exh. E.]

F. MH Is "First To File" Its Action In New Jersey on July 18, 2005; After Learning of MH's New Jersey Action, ICI Files Its Own Action In California on July 29, 2005.

After the termination of discussions about a potential acquisition or other business arrangement, and in direct contravention of the express terms of the Non-Binding Letter, ICI claimed that MH was obligated to purchase ICI. [Declaration of Mark E. Duckstein ("Duckstein Decl.") ¶ 3.] On July 18, 2005, Reed Elsevier, Inc., of which MH is a division, filed an action against ICI in the Superior Court of New Jersey, (Docket No. UNN-L-2583 05), seeking to construe the terms of the Non-Binding Letter and a judgment declaring that MH did not breach any obligation to ICI in connection with (i) the parties' discussions concerning a potential business transaction as contemplated in the Non-Binding Letter signed by the parties and that (ii) Reed Elsevier has no liability to ICI for terminating its preliminary interest in pursuing such transaction (the "New Jersey Action"). [Req. Jud., Exh. A; Duckstein Decl., ¶ 3 and Exh. A.] At the time the Reed Elsevier Complaint was filed, venue was proper in Union County, New Jersey, because a substantial part of the events related to the claims occurred in such county, and because most of the relevant witnesses and documents are in such county, as well as one of Reed Elsevier's divisions.

On the same day that the New Jersey Action was filed, MH's counsel sent a copy of the Complaint by facsimile transmission to Patrick Catalano, Esq., the San Francisco-based attorney retained by ICI with respect to this dispute. [Duckstein Decl., ¶ 4 and Exh. B.] ICI's San Francisco counsel notified MH's counsel that, notwithstanding the New Jersey Action, ICI intended to file a similar lawsuit on behalf of ICI in California, despite MH's view that any such filing would be improper since a case was already pending and, in any event, this matter has absolutely no connection with the State of California. [Duckstein Decl., ¶ 5.] MH effectuated service of process upon ICI on July 20, 2005, and ICI acknowledged receipt of the service of process related to the New Jersey action on July 22, 2005. [Duckstein Decl., ¶ 6-7 and Exh. C-D.]

On July 29, 2005, ICI, through Mr. Catalano, filed an action in the Superior Court of

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

California for the County of San Francisco, involving the same parties and same facts as the first-filed New Jersey Action. [Duckstein Decl., ¶ 8 and Exh. E.] On August 16, 2005, ICI removed MH's New Jersey Action to the United States District Court for the District of New Jersey where it remains pending. [Duckstein Decl., ¶ 9-10 and Exh. F; Req. Jud., Exh. B.]

III. UNDER THE "FIRST TO FILE" DOCTRINE, THIS COURT SHOULD DISMISS THIS ACTION IN FAVOR OF THE PREVIOUSLY-FILED NEW JERSEY ACTION, OR ALTERNATIVELY, TRANSFER THIS ACTION TO THE NEW JERSEY DISTRICT COURT

Because Reed Elsevier was the first to file its action against ICI arising from the potential acquisition transaction, this Court should dismiss the present action (or alternatively transfer this action to the District of New Jersey) pursuant to the federally-recognized "first to file" doctrine. Generally, the "first to file" rule supports dismissing, transferring or staying a second-filed action when a similar complaint has already been filed in another jurisdiction. See, Alltrade Inc. v. Uniweld Products, Inc., 946 F.2d 622, 623 (9th Cir. 1991) ("first to file" rule is "well-established"); Pacesetter Systems, Inc. v. Medtronic, Inc., 678 F.2d 93, 94-95 (9th Cir. 1982) (affirming dismissal order of second action); Ward v. Follett Corp., 158 F.R.D. 645, 648 (N.D. Cal. 1994) (granting motion to dismiss second action).

"Normally sound judicial administration would indicate that when two identical actions are filed in courts of concurrent jurisdiction, the court which first acquired jurisdiction should try the lawsuit and no purpose would be served by proceeding with a second action." Pacesetter Systems, supra, 678 F.2d at 95. "The doctrine is designed to avoid placing an unnecessary burden on the federal judiciary, and to avoid the embarrassment of conflicting judgments . . . ." Church of Scientology of Calif. v. United States Dep't of Army, 611 F.2d 738, 750 (9th Cir. 1979); Alltrade, supra, 946 F.2d at 625 (the first-to-file rule was developed for the "purpose of promoting efficiency"). The "first to file" rule should "not be disregarded lightly." Church of Scientology of Calif., supra, 611 F.2d at 750.

In applying this rule, a court examines three factors: (1) the chronology of the two actions; (2) the similarity of the parties; and (3) the similarity of the issues. Alltrade, 946 F.2d at 625-26; Pacesetter Systems, 678 F.2d at 95. The chronology of the two actions clearly shows not only that

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

the New Jersey action was filed first, but that ICI engaged in deliberate forum shopping in an attempt to bring the adjudication of this dispute close to the location of ICI's counsel. On July 18, 2005, Reed Elsevier (of which MH is a division) filed its initial action against ICI in the state of New Jersey court seeking, among other things, a declaration of the rights and obligations between the parties arising from the Non-Binding Letter. [Req. Jud., Exh. A; Duckstein Decl., ¶ 3 and Exh. A.] Because many of the events from which the claims arose occurred in New Jersey, where MH's office is located in Union County, New Jersey, venue was and continues to be appropriate in that county. See this Memo, infra, Section IV.

Reed Elsevier's counsel provided a copy of the New Jersey complaint to ICI's counsel on the same day that the complaint was filed. [Duckstein Decl., ¶ 4.] During a conversation later that day, ICI's counsel acknowledged receipt of the New Jersey pleading, yet nevertheless stated that he intended to file lawsuit in California, similar to the action already filed in New Jersey, despite admonitions that this matter had no connection with California. [Duckstein Decl., ¶ 5.] Following the call between the parties' counsel on July 18, 2005, service of Reed Elsevier's complaint was effectuated on ICI on July 20, 2005, and acknowledged on July 22, 2005. [Duckstein Decl., ¶ 6-7.] In a transparent attempt to bring the adjudication of the parties' dispute close to ICI's San Francisco counsel, ICI filed the present action in the Superior Court for the City and County of San Francisco, despite the fact that Reed Elsevier had already filed a nearly identical action between the same parties raising the same issues in the previously-filed New Jersey action. [Duckstein Decl., ¶ 8 and Exh. A, E.] See Pacesetter Systems, supra, 678 F.2d at 94 (affirming "first to file" rule where first action was filed three days before second action).

Second, the parties to the two pending federal court cases are not merely similar but identical. Reed Elsevier and ICI have each brought actions against each other. The parallelism between the parties clearly meets this second requirement. Third, the facts and issues in the two actions will be the same (once issues are joined by way of counterclaim). Both actions are founded on the events surrounding MH's consideration of a potential acquisition of certain ICI assets, and the Non-Binding Letter. [Compare Complaint and Req. Jud., Exh. A; Duckstein Decl., Exhs. A, E.] Both actions relate to the same agreement (the Non-Binding Letter). Both actions seek

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

declaratory relief, and a determination of the rights and obligations, if any, between the parties. Based on the goals of judicial efficiency which strongly favor the application of the "first-to-file" rule here, the fact that the cases involve the same parties, facts, and issues, and given the circumstances which apparently motivated the filing of the second California action, the present action should be dismissed (or alternatively, transferred to the New Jersey District Court). Alltrade, supra, 946 F.2d at 625; Church of Scientology of Calif., supra, 611 F.2d at 750; Pacesetter Systems, 678 F.2d at 95.

IV. ABSENT DISMISSAL, THE PRESENT ACTION SHOULD BE TRANSFERRED TO THE DISTRICT OF NEW JERSEY PURSUANT TO 28 U.S.C. SECTION 1404(a) FOR THE CONVENIENCE OF THE PARTIES AND IN THE INTEREST OF JUSTICE

In the alternative to dismissing this action under the "first-to-file" doctrine, this action should be transferred to the District of New Jersey. Pursuant to 28 U.S.C. § 1404(a), which provides in part, "[f]or the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought," this court has the broad authority to transfer this case. 28 U.S.C. § 1404(a); Van Dusen v. Barrack, 376 U.S. 612, 616, 84 S.Ct. 805, 809 (1964); Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000). Transfer under Section 1404(a) is appropriate if it is "warranted by the convenience of the parties and witnesses and promotes the interest of justice." Van Dusen v. Barrack, 376 U.S. at 616, 84 S.Ct. at 809. The purpose of Section 1404(a) is to "prevent the waste 'of time, energy, and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense.'" Van Dusen v. Barrack, 376 U.S. at 616, 84 S.Ct. at 809.

A. Venue is Proper in the District of New Jersey Because a Substantial Part of the Events Giving Rise to the Present Claims Occurred in Such District

To support a motion for transfer, the moving party must establish (1) that venue is proper in the transferor district, (2) that the transferee district is one where the action might have been brought, and (3) that the transfer will serve the convenience of the parties and witnesses and will promote the interest of justice. Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp., 820 F.Supp. 503, 506 (C.D. Cal. 1992). Thus, a threshold consideration on a motion to transfer is

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

whether the case could have been brought in the proposed district. Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp., 820 F. Supp. 503, 506 (C.D. Cal. 1992).

Where, as here, federal jurisdiction is based on diversity of citizenship, the case may be brought in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated . . .." See 28 U.S.C. § 1391(a)(2). In this action, a substantial part of the events or omissions giving rise to ICI's claims occurred in the District of New Jersey. From the initial inquiry about a potential transaction between MH and ICI, through the termination of discussions, many of the events related to the present claims occurred in New Jersey.

MH's offices are located in the District of New Jersey. [Little Decl., ¶ 2.] The parties' discussion began in August 2004, when ICI first contacted MH in New Jersey to suggest a possible acquisition of ICI. [Corcoran Decl., ¶ 14; Little Decl., ¶ 4.] To explore this business possibility, the parties entered into a Non-Disclosure Agreement dated November 1, 2004, which expressly provided that it "shall be governed by laws of the State of New Jersey, USA, regardless of the laws that might otherwise apply under applicable principles of conflicts of law," and established a two-year period where its confidentiality terms remained in effect. [Little Decl., ¶ 5-6 and Exh. A.] Because the terms of the Non-Disclosure Agreement contain an express choice of law provision, ICI's third claim for fraud which alleges that Defendants somehow misused the purported and unspecified "trade secrets" they obtained during their investigation is governed by New Jersey law, as may be all of ICI's other claims. [Duckstein Decl., Exh. E (ICI Complaint, ¶ 15); Little Decl., ¶ 5-6 and Exh. A.]

From August 2004 through June 2005, ICI sent to MH in New Jersey approximately 100 communications (by telephone and e-mail) regarding a possible business transaction between the companies, many of which were used by ICI to provide MH with information regarding ICI's operations. [Little Decl., ¶ 7.] In May 2005, ICI's President, Debra Kamys, traveled to MH's New Jersey office to make detailed presentations about ICI to MH representatives. [Little Decl., ¶ 7.] While in New Jersey for these presentations, MH presented Ms. Kamys with its Non-Binding Letter, which was signed by MH's Chief Operating Officer located in New Jersey. [Little Decl.,

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

¶ 7-8 and Exh. B.] Further negotiations on the language of the Non-Binding Letter followed, with numerous email and conference calls exchanged between MH's office in New Jersey and ICI's office in Oregon. [Little Decl., ¶ 9.] By June 17, 2005, ICI had signed and returned the revised Non-Binding Letter to MH in New Jersey. [Little Decl., ¶ 9-12.] After due diligence by MH indicated that it should not proceed with any ICI acquisition or other venture, on June 28, 2005, MH's Chief Operating Officer, located in New Jersey, advised ICI by telephone and by an e-mail sent from New Jersey that it had no interest in moving forward with any proposed transaction with ICI. [Little Decl., ¶ 13-16 and Exh. D.]

B. Personal Jurisdiction May be Asserted Over ICI in the District of New Jersey

Personal jurisdiction may also be asserted against ICI in New Jersey.[2] A court may exercise personal jurisdiction over a non-resident defendant only where "minimum contacts" exist such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). These contacts must be of the quality and nature such that the non-resident defendant "should reasonably anticipate being haled into court there." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985). Because the quality and nature of ICI's contacts with New Jersey are sufficient for either "general" or "specific" jurisdiction, personal jurisdiction can be asserted against ICI in New Jersey.[3]

To assert "general" jurisdiction, ICI's contacts with the forum state (New Jersey) must be "continuous and systematic" so that ICI could expect to be haled into court in New Jersey.

---

[2] Rule 4(e) of the Federal Rules of Civil Procedure allows a district court to exercise personal jurisdiction over a non-resident defendant to the extent allowed by the long-arm statute of the state where the court sits. See Fed. Rule Civ. Proc. 4(e). "New Jersey's long-arm statute permits the exercise of personal jurisdiction over a non-resident defendant to the fullest extent permitted by the Due Process Clause of the Fourteenth Amendment. See N.J. Ct. R. 4:4-4(c)(1)." Wartsila NSD North America v. Hill Intern., Inc., 269 F. Supp. 2d 547, 552 (D. N. J. 2003); see also DeJames v. Magnificence Carrier Inc., 654 F.2d 280, 284 (3d Cir.), cert. denied, 454 U.S. 1085 (1981); Doumani v Casino Control Comm'n, 614 F. Supp. 1465, 1471 (D.N.J. 1985).

[3] ICI filed a motion to dismiss the New Jersey Action on the grounds that the United States District Court for the District of New Jersey (the "New Jersey Court") does not have personal jurisdiction over ICI, or to transfer such action to the Northern District of California. ICI's motion in the New Jersey Action is returnable on September 26, 2005, for hearing, and the New Jersey Court may have ruled on whether personal jurisdiction over ICI can be maintain in New Jersey by the time the present Motion is heard.

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-16 & 414 n. 9 (1984); Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987). To show specific jurisdiction, ICI must have purposefully directed his activities at residents of the forum, sufficient to establish minimum contacts under International Shoe. See Henry Heide Inc. v. WRH Prods. Co., 766 F.2d 105, 108 (3d Cir. 1985). Specific personal jurisdiction may arise from particular or sporadic contacts if the "claim is related to or arises out of the defendant's contacts with the forum." Mellon Bank (East) PSFS Nat'l Ass'n v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992) (citations omitted); see also Helicopteros, 466 U.S. at 414 & 414 n. 8. The facts show that ICI's contacts with New Jersey are sufficient for either general or specific jurisdiction over ICI in New Jersey.

During the last 10 years or so, ICI continuously and purposefully directed its activity to New Jersey by selling its products and services to MH, visiting MH's New Jersey's office approximately 40 times, entering into the Marketing Alliance Agreement, sending numerous e-mails to MH in New Jersey and making multiple phone calls to MH in New Jersey in connection with the parties' direct customer/vendor relationship, their marketing alliance, and their recent discussions about a potential acquisition deal. [Little Decl., ¶ 7-8; Corcoran Decl., ¶ 10-13.] Moreover, under the Marketing Alliance Agreement, ICI agreed to arbitrate any dispute arising from the Agreement in New Jersey or New York. [Corcoran Decl., ¶ 5.] Having agreed to resolve any disputes under such Agreement with MH in New Jersey or New York, ICI cannot now claim that litigating a dispute in New Jersey is unreasonable or unexpected. After the parties' Marketing Alliance Agreement ended, ICI continued to do business with MH which paid substantial amounts to ICI for its work. [Corcoran Decl., ¶ 8-9.] See also this Memo, supra, Section II. Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-298, 100 S. Ct. 559, 567 (1980) (selling goods or services in the forum state is sufficient for personal jurisdiction); Burger King Corp., v. Rudzewicz, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183 (1985) (parties that sustain "continuing relationships and obligations" with the forum state have "purposefully availed" themselves of the benefits of the forum state); Roth v. Garcia Marquez, 942 F.2d 617, 622 (9th Cir. 1991) ("continuing and extensive involvement with the forum" sufficient for personal jurisdiction).

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

Specific jurisdiction over ICI is also satisfied through its New Jersey contacts in connection with the present claims. The possibility of a potential acquisition began with ICI's initial contact to MH in New Jersey. [Corcoran Decl., ¶ 14; Little Decl., ¶ 4.] To facilitate MH's exploration of a potential deal, ICI executed a Non-Disclosure Agreement where it agreed to New Jersey law as the governing law. [Little Decl., ¶ 6.] From August 2004 to June 2005, during the negotiations and discussions concerning a possible acquisition deal, ICI engaged in numerous contacts with MH's New Jersey office -- making or sending approximately 100 calls and e-mails, as well as at least one in-person visit to MH's New Jersey office in May 2005 for presentations directly to MH executives. [Little Decl., ¶¶ 7-8.] Negotiations by ICI were also directed to MH's New Jersey office thereafter, ultimately resulting in ICI sending its execution of the Non-Binding Letter to New Jersey. [Little Decl., ¶¶ 9-12.] See also, this Memo, supra, Section II. See, Mellon Bank (East), supra, 960 F.2d at 1221; Helicopteros, 466 U.S. at 414 & 414 n. 8. Thus, ICI's continuing pattern of contact with MH in New Jersey, in connection with the parties' marketing agreement and the potential acquisition deal, make litigating this dispute in New Jersey fair and reasonable. Burger King Corp., v. Rudzewicz, 471 U.S. 462, 477-478, 105 S.Ct. 2174, 2184-2185 (1985)(exercise of personal jurisdiction must be comport with "fair play and substantial justice"); Haisten v. Grass Valley Medical Reimbursement Fund Ltd., 784 F.2d 1392, 1397 (9th Cir. 1986).

C. The Balance of the Public and Private Interests Favor Transfer To The District of New Jersey.

1. The Convenience of the Parties and Most of the Witnesses Dictate Transfer to the District of New Jersey.

After determining that an alternative venue exists, the Court must evaluate whether transfer would promote both the private interests of the parties and the public interest in the administration of justice. See Decker Cole, Co. v. Common Wealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986). The Ninth Circuit has set forth several non-exclusive criteria that should be considered, including: (1) the convenience of the parties and witnesses; (2) proximity to operative events; (3) ease of access to the evidence; (4) feasibility of consolidation of other claims; (5) any local interest in the controversy; and (6) plaintiff's choice of forum. See Williams v. Bowman, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001); Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

(9th Cir. 1986); Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000).

In evaluating the "interests of justice," this court should weigh heavily the pendency of a related action in the U.S. District Court for the District of New Jersey. See Durham Production, Inc. v. Sterling Film Portfolio, Ltd., Series A, 537 F. Supp. 1241, 1243 (S.D.N.Y. 1982) ("Pendency of related actions in the transferee forum is also an important factor" where transfer is strongly favored to facilitate efficiency"). The pendency of another action filed in New Jersey prior to the commencement of the present action, militates strongly in favor of transfer. Berman v. Infomix Corp., 30 F. Supp. 2d 653, 658 (S.D.N.Y. 1998) ("courts routinely transfer cases when the principal events occurred and the principal witnesses are located in another district"); Injen Technology Co., Ltd. v. Advanced Engine Mgmt., Inc., 270 F. Supp. 2d 1189, 1196 (S.D. Cal. 2003) (motion to transfer granting where most of the events did not occur in the forum, even though chosen forum was home to plaintiff's counsel).

The convenience of the witnesses is one of the most important factors in the venue determination. Hernandez v. Graebel Van Lines, 761 F. Supp. 983, 988 (E.D.N.Y. 1991) (convenience of the witness is "probably the single-most important factor in the analysis"); Sundle Lining Const. Corp. v. Fireman's Fund Ins. Co., 844 F. Supp. 1163, 1166 (S.D. Tex. 1994) (relative convenience of witness is "the most important factor"); Geo. F. Martin Co. v. Royal Insurance Co. of Am., 2004 WL 1125048 *3 (N.D. Cal. 2004). None of the relevant witnesses in this matter are located in the Northern District of California. That fact alone starkly demonstrates the impropriety of ICI's effort to have this Court host this dispute.

Based on ICI's recent due diligence, no representative of ICI or MH who had anything to do with the matters in dispute in this action appears to be located in California. [Little Decl., ¶ 25.] ICI has no corporate office or any physical presence anywhere other than Portland, Oregon. [Little Decl.; ¶ 15; Marinez Decl., ¶ 3-4, 6.] ICI appears to have no operations in California, no employees in California, nor any real property in California. [Little Decl., ¶ 15.] Although ICI's counsel is located in San Francisco, the convenience of ICI's counsel who is located in California is not considered in a Section 1404(a) motion. Soloman v. Continental American, 472 F.2d 1043, 1047 (3d Cir. 1973) ("convenience of counsel is not a factor to be considered"); In re Horseshoe

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

Entertainment, 305 F.3d 354, 358 (5th Cir. 2002) ("The factor of 'location of counsel' is irrelevant and improper for consideration" in determining the question of transfer). None of MH's witnesses are located in California either.

Almost all of MH's likely witnesses in this matter are located in New Jersey. [Little Decl., ¶ 18-19.] MH has already identified 14 likely witnesses who were integrally involved in the preliminary discussions between the parties, the due diligence review of ICI's operations from which recommendations were made to MH corporate representatives, or made the ultimate decision whether to enter into a transaction with ICI are located in New Jersey - - twelve of whom are located in New Jersey. [Little Decl., ¶ 18-19.] On balance, therefore, it would be far more convenient for the large majority of the witnesses if this litigation was transferred to the District Court of New Jersey.

As presently venued, this case would require both parties and all the likely witnesses to travel hundreds, if not thousands of miles, from New Jersey, Oregon or Ohio to California to defend the case and appear at trial, despite the fact that the case has nothing to do with California. Although some of ICI's witnesses may be located in Oregon, the vast majority of the witnesses with knowledge of the facts in this matter are located in New Jersey. [Little Decl., ¶ 18-19.] The degree of disruption to the parties and witnesses would be significantly reduced if this case is transferred to the District of New Jersey because of its proximity to where the majority of witnesses who will likely appear at trial work and reside. See Helfant v. LA & So Life Ins. Co., 82 F.R.D. 53, 58 (E.D.N.Y. 1979) ("The obvious disruption caused to [the witnesses'] daily work routine and that of the corporations they work for is persuasive evidence that such a transfer would promote the parties convenience."); Pacific Car & Foundry Co. v. Pence, 403 F.2d 949, 953 (9th Cir. 1968) (reversing district court's denial of motion to transfer when, "[m]any witnesses, including several members of the petitioner's corporate staff, would have travel [to plaintiff's original forum] in order to give testimony with consequent disruption of the conduct of petitioner's operation."). Moreover, the majority of the likely witnesses are beyond the subpoena power of this Court and therefore their presence at trial could not be compelled.

California presents a very inconvenient forum for the adjudication of the claims asserted by

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

ICI in this action (and to be asserted by way of Counterclaim by the defendants). [Little Decl., ¶ 25.] Considerations of convenience and accessibility to most of the likely witnesses, clearly favor transfer of this action to the District of New Jersey.

2. Proximity to Operative Events.

New Jersey is in close proximity to the many events describing the parties' relationship and the operative facts related to the present claims, while California has little or nothing to do with this dispute. Beside the location of MH's office which is in New Providence, New Jersey, and the many witnesses that live in the New Jersey area, ICI had a long-standing relationship with MH's New Jersey employees in connection with both the Marketing Alliance Agreement and the aborted acquisition deal. [Little Decl., ¶ 7-9, 18-19; Corcoran Decl., ¶ 10-13.] For years, ICI worked closely and regularly with MH's New Jersey office under the Marketing Alliance Agreement to develop websites for MH's own products and services. [Corcoran Decl., ¶ 12-13.] Moreover, ICI's first contact about the possibility of an acquisition transaction at issue occurred in New Jersey. [Corcoran Decl., ¶ 14.] ICI personnel, made numerous visits to the MH office in New Jersey over last ten years, including its President, Ms. Kamys, who made key presentations to MH's executives to discuss the potential acquisition. [Corcoran Decl., ¶ 10; Little Decl., ¶ 7.] Approximately 100 emails, correspondence and phone calls were sent or made, to MH in New Jersey by ICI to discuss the possible acquisition of ICI. [Little Decl., ¶ 7-9.] By contrast, none of the events underlying this dispute occurred in California. [Little Decl., ¶ 25; Corcoran Decl., ¶ 16.]

3. Ease of Access to Documents.

Because most material events occurred in the New Jersey or Oregon area, the "sources of proof" and access to documents favors New Jersey over California as the venue for this case. All of MH's files relevant to the possible acquisition deal are located in New Jersey. [Little Decl., ¶ 21-24.] MH's emails are also accessible through computer resources in New Jersey. [Little Decl., ¶ 22.] This factor favors transfer to New Jersey, where there is a similar action pending, rather than retaining this action in California, where apparently none of the relevant documents are located.

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

4. Feasibility of Consolidation of Claims.

Where the Court transfers the action in "the interest of justice," governing factors include avoidance of multiple actions, sending the action to the state most familiar with governing law, and feasibility of consolidation with other actions. Ferens v. John Deere Co., 494 U.S. 516, 532 (1990) ("To permit a situation in-which two cases involving precisely the same issues are simultaneously pending in different district courts leads to a wastefulness of time, energy and money that Section 1404(a) was designed to prevent.", quoting Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26 (1960)); A.J. Industries, Inc. v. United States Dist. Ct., 503 F.2d 384, 389 (9th Cir. 1974). Judicial economy is served by transferring this action to New Jersey, where an identical action is pending. Cambridge Filter v. International Filter Co., Inc., 548 F. Supp. 1308, 1310 (D. Nev. 1982) (litigation of "related claims in the same tribunal is favored to avoid duplicitous litigation, attendant unnecessary expense, loss of time to courts, witnesses, litigants and inconsistent results); Fairfax Dental (Ireland), Ltd. v. S.J. Filhol Ltd., 645 F.Supp. 89, 92 (E.D. N.Y. 1986) ("the pendency of a related case in the proposed transfer reform is a powerful reason to grant a motion for change of venue.").

Moreover, New Jersey law governs the parties' Non-Disclosure Agreement. [Little Decl., ¶ 6 and Exh. A.] ICI's third claim for fraud, alleging that Defendants somehow misused ICI's purported "trade secrets" should thereby governed by New Jersey law (and defendants contend that New Jersey law governs the other claims as well). The applicability of New Jersey law to some, if not all, of ICI's claims favors transfer of this action to the District of New Jersey. Laumann Mfg. Corp. v. Castings USA, Inc., 913 F. Supp. 712, 721-722 (E.D.NY 1996) (court whose law will govern the case is favored in consideration of a motion to transfer); Van Dusen v. Barrack, 376 U.S. 612, 645, 84 S.Ct. 805 (1964) (state where federal judges are more familiar with the governing law is a factor to be considered in a transfer motion); Gundle Lining Const. V. Fireman's Fund Ins., 844 F. Supp. 1163, 1166 (S.D. Tex. 1994).

The claims asserted by ICI in California should be adjudicated in New Jersey, whether by way of the transfer of this action to the District of New Jersey for consolidation with the recently removed New Jersey action or through a dismissal of this case so that ICI can assert its claims by way of counterclaim in the New Jersey Action. Litigating this action in California would be inconvenient to MH and the present court would likely apply New Jersey law to adjudicate as least some, if not all, of the present claims.

5. Local Interest in the Controversy.

California has no interest in adjudicating a business dispute arising from a letter negotiated by MH in New Jersey and ICI in Oregon, which has no impact whatsoever on California. Absolutely nothing related to this case took place in California -- not one phone call, not one letter, not one e-mail, not one personal visit. [Little Decl., ¶ 25; Corcoran Decl., ¶ 16.] No representative of ICI or MH who had anything to do with the matters in dispute in this action is located in California. [Little Decl., ¶ 25, Corcoran Decl., ¶ 16.]

This is a dispute between a New Jersey-based company and an Oregon-based company where the substantial weight of the witnesses and proofs are located in New Jersey. [Little Decl., ¶ 16, 18-23; Corcoran Decl., ¶ 17.] As a company whose principal office is located in New Jersey, MH seeks to resolve this dispute in New Jersey -- not only because the facts of this dispute have a close nexus to New Jersey, where many of the events and contacts surrounding this action occurred, and where the disputed Non-Binding Letter of Interest was made and delivered to ICI, but because New Jersey is also the jurisdiction where the first lawsuit concerning the Non-Binding Letter of Interest was filed. [Little Decl., ¶ 26; Corcoran Decl., ¶ 17.] Because many of the activities at issue in this case occurred in New Jersey, the State of New Jersey has an interest in resolving the present dispute. This factor overwhelming favors transfer to New Jersey.

6. Plaintiff's Choice of Forum Should be Given Little, if any, Deference.

ICI's chosen forum should be given little consideration here because it does not reside in this district and this forum lacks a significant connection (or any connection) to the activities alleged in the Complaint. Where "the operative facts have not occurred within the forum of original selection and that forum has no particular interest in the parties or the subject matter, the plaintiff's choice is entitled to only minimal consideration." Pacific Car, et al. v. Pence, 403 F.2d 949, 954 (9th Cir. 1968). See also, Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987) (if the parties "contacts with the forum" and "operative facts have not occurred within the forum,"

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

plaintiff's choice of forum is entitled to only minimal consideration); cert. denied, 485 U.S. 933 (1988); Williams v. Bowman, 157 F.Supp. 2d 1103, 1106 (N.D. Cal. 2001); Jones, supra, 211 F.3d at 498 (9th Cir. 2000). Retaining jurisdiction here would serve neither the public's interest, nor in the interests of justice. Neither party will be able to compel the attendance of key witnesses, who principally reside in New Jersey or Oregon.

Moreover, where (like here) the plaintiff appears to be forum shopping in selecting venue, the plaintiff's choice receives little or no deference in a transfer analysis. Reiffin v. Microsoft Corp., 104 F. Supp. 2d 48, 54 n.12 (D.C. 2000) (plaintiffs chosen forum will be accorded little deference where plaintiff engaged in forum shopping). See also Royal Queentex Enterprises, Inc. v. Sara Lee Corp., 2000 WL 246599 *3 (N.D. Cal. 2000) ("Circumstances in which a plaintiff's chosen forum will be accorded little deference include cases of . . . forum shopping.").

V. THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(6) FOR FAILURE TO PLEAD FRAUD WITH PARTICULARITY

ICI's complaint should be dismissed for failure to plead fraud with specificity. Under Federal Rule of Civil Procedure 9(b), "the circumstances constituting fraud or mistake shall be stated with particularity." See Fed. Rule Civ. Proc. § 9(b). Rule 9(b) deters plaintiffs from making unspecified and boilerplate claims of alleged fraud as a litigation tactic and eliminates actions where the plaintiff hopes to learn the facts of the alleged fraud after discovery. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999); Hayduk v. Lanna, 775 F.2d 441, 443 (1st Cir. 1985) (Rule 9(b) prohibits plaintiffs from filing suit before searching for specific facts grounded in fraud).

In the present complaint, ICI alleges in one paragraph, and "on information and belief," that "Defendants entered into the alleged [Non-Binding Letter] for the purpose of finding out Plaintiff's trade secrets." [Duckstein Decl., Exh. E (Compl., ¶15).] ICI also asserts that "Defendants [utilized] this [unspecified] trade secret information to obtain an unfair competitive advantage in their own business of creating web sites for law firms through the United States." [Compl., ¶ 15.]

Rule 9(b) requires that Plaintiff be "meticulous" in its allegations on the circumstances of the fraud. Desaigoudar v. Meyercord, 223 F.3d 1020, 1022 (9th Cir. 2000) (fraud must be pled

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

"with a high degree of meticulousness"). Plaintiff's allegations fall woefully short of the particularity required by Rule 9(b). In re Glenfed Inc. Sec. Litig., 42 F.3d 1541, 1547-1548 and n.7 (9th Cir. 1994) (citing Rule 9(b) required pleading evidentiary facts, such as time, place, persons, statement and explanation of why statements or conduct are fraudulent).

ICI fails to allege facts showing that any information transferred to MH qualifies as a "trade secret," and fails to specify which alleged "trade secrets" were improperly "utilized," how they were used to obtain an alleged unfair advantage, or any facts showing that Defendants' supposed "purpose" or intent was improper. ICI does not allege how or when Defendants allegedly gained and used the unnamed trade secret information, nor what unfair advantage was obtained by Defendants for their own business, nor for which websites such information was allegedly improperly used. [See, Compl., ¶ 15.] There are no facts which support the broad brush and self-serving allegations that Defendants' "never intended to purchase Inherent, Inc.". [Compl., ¶ 15.] The vague and conclusory allegations pled by ICI are insufficient to meet the particularity standard. Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989) (the "time, place and nature of the alleged fraudulent activities" must be pleaded with specificity); Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) ("Averments of fraud must be accompanied by 'the who, what, when, where, and now' of the misconduct charged" under Rule 9(b)). Fraud allegations that fail to meet the stringent Rule 9(b) standards are disregarded, and the remaining allegation evaluated to determine if a valid claim has been stated. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105 (9th Cir. 2003). Accordingly, in the alternative to dismissing this action under the "first to file doctrine," ICI's complaint should be dismissed for failure to plead fraud with particularity under Rule 9(b).

///

///

///

///

///

///

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

VI. CONCLUSION

For the reasons set forth above, Defendants request that the present action be dismissed pursuant to the "first to file" doctrine, or in the alternative, transferred to the District of New Jersey pursuant to 28 U.S.C. § 1404 or dismissed for failure to plead fraud with particularity under Rule 9(b).

DATED: September 7, 2005

Respectfully Submitted,

SHARTSIS FRIESE LLP

By: */s/ Zesara C. Chan*
ZESARA C. CHAN

Attorneys for Defendants

MARTINDALE-HUBBELL AND
LEXIS/NEXIS, divisions of REED ELSEVIER, INC.

ZCC\7002\001\1317371.04

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598